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No. 99-1671

In the Supreme Court of the United States

CHRISTINA BREWER, PERSONAL REPRESENTATIVE FOR THE ESTATE OF RICHARD BREWER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The government's liability for maritime torts under the Suits in Admiralty Act (SIAA), 46 U.S.C. 741 *et seq.*, is the same as that "obtaining in like cases between private parties." 46 U.S.C. 743. Suits for maritime torts under the Public Vessels Act (PVA), 46 U.S.C. 781 *et seq.*, "shall be subject to and proceed in accordance with" the requirements of the SIAA, to the extent the SIAA is not inconsistent with the PVA. 46 U.S.C. 782. The question presented is:

Whether, for purposes of suit under the SIAA and PVA, the conduct of the Coast Guard in attempting to rescue a stranded vessel is subject to the "Good Samaritan" standard applicable to private parties or to a different standard.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Arizona Maintenance Co. v. *United States*, 864 F.2d 1497 (9th Cir. 1989)	10
Berg v. *Chevron USA, Inc.*, 759 F.2d 1425 (9th Cir. 1985)	4, 6
Bunting v. *United States*, 884 F.2d 1143 (9th Cir. 1989)	8, 9
Canadian Transp. Co. v. *United States*, 663 F.2d 1081 (D.C. Cir. 1980)	11
Cassens v. *St. Luis River Cruise Lines*, 44 F.3d 508 (7th Cir. 1995)	11
Chaffin v. *United States*, 176 F.3d 1208 (9th Cir. 1999)	9
Coumou v. *United States*, 107 F.3d 290, amended, 114 F.3d 64 (5th Cir. 1997)	8
Eklof Marine Corp. v. *United States*, 762 F.2d 200 (2d Cir. 1985)	9
Furka v. *Great Lakes Dredge & Dock Co.*, 755 F.2d 1085 (4th Cir. 1985)	6
Gercey v. *United States*, 540 F.2d 536 (1st Cir. 1076), cert. denied, 430 U.S. 954 (1977)	11
Good v. *Ohio Edison Co.*, 149 F.3d 413 (6th Cir. 1998)	10
Huber v. *United States*, 838 F.2d 398 (9th Cir. 1988)	9
Joint E. & S. Dists. Asbestos Litig., In re, 891 F.2d 31 (2d Cir. 1989)	11

Cases—Continued:	Page
Miller v. *United States*, 725 F.2d 1311 (11th Cir. 1984)	7
Olympia Sauna Compania Naviera, S.A. v. *United States*, 670 F. Supp. 1498 (D. Or. 1987)	9
Sea-Land Serv., Inc. v. *United States*, 919 F.2d 888 (3d Cir. 1990)	11
Sutton v. *Earles*, 26 F.3d 903 (9th Cir. 1994)	9
United States v. *Gavagan*, 280 F.2d 319 (5th Cir. 1960)	7, 8
United States v. *Lawter*, 219 F.2d 559 (5th Cir. 1955)	8
United States v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976)	7
Wisniewski v. *United States*, 353 U.S. 901 (1957)	10
Statutes:	
Death on the High Seas Act, 46 U.S.C. 761 *et seq.*	7
Federal Tort Claims Act:	
28 U.S.C. 1346(b)(1) (1994 & Supp. IV 1998)	7
28 U.S.C. 2674 *et seq.*	7
28 U.S.C. 2680(d)	7
Public Vessels Act, 46 U.S.C. 781 *et seq.*	3-4
46 U.S.C. 781	4, 6
46 U.S.C. 782	4, 6, 7
Suits in Admiralty Act, 46 U.S.C. 741 *et seq.*	3
46 U.S.C. 742 (1994 & Supp. III 1997)	3, 6
46 U.S.C. 743	4, 7
14 U.S.C. 88(a)	10
14 U.S.C. 88(a)(1)	10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 210 F.3d 381 (Table). The opinion of the district court (Pet. App. 1c-15c) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1999. The petition for a writ of certiorari was filed on March 24, 2000. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Christina Brewer claims that the United States Coast Guard is responsible for the death of her husband, Richard Brewer (Brewer), in a boating accident in Monterey Bay, California. On October 29, 1994, Brewer and David Hoover went fishing in Monterey Bay on Brewer's boat, the *Foxtrot*. About a half-mile from shore, the *Foxtrot* experienced engine difficulties and Brewer and Hoover were unable to get it restarted. Pet. App. 2c. Brewer established radio contact with Brandon Hansen, the Coast Guard operator on duty, and told him that they required assistance because the *Foxtrot*'s motor had gone out. Hansen, under the supervision of Gary Walker (the Coast Guard Officer of the Day and the Search and Rescue controller for Monterey Bay), requested the *Foxtrot*'s position and asked whether they were in immediate danger. *Id.* at 2c-3c. Brewer advised Hansen of the *Foxtrot*'s position and stated that they were not in immediate danger. Hansen asked them to anchor the *Foxtrot* and don life jackets. At the same time, Walker informed Dennis McGraw, coxswain of Coast Guard Vessel 367, that the *Foxtrot* was disabled, and directed him to conduct a routine patrol of the Bay. *Id.* at 3c.

Brewer advised Hansen that he and Hoover had donned life jackets but that the *Foxtrot* was without anchor. After a further discussion about conditions near the *Foxtrot* (interrupted several times because of another boat's transmissions), Hansen learned that the *Foxtrot* was drifting toward shore. Based on that information, Walker upgraded the *Foxtrot*'s status to a distress case and instructed McGraw to go pick up Brewer and Hoover. McGraw started preparing Vessel

367 for departure six minutes and 40 seconds after Brewer and Hansen first made radio contact. Pet. App. 4c.

One minute later, Hansen informed Brewer that a Coast Guard vessel was on its way to his position. Hansen requested further information from Brewer about the *Foxtrot*'s location and about any medical problems that he or Hoover was experiencing. Brewer advised Hansen that they had no medical problems but that the waves were breaking right in front of the *Foxtrot*. At that point, 12 minutes and four seconds after first making radio contact with Brewer, Hansen issued an emergency message to all boaters. In that message, Hansen described the *Foxtrot*'s location, indicated it was disabled and drifting toward shore, and asked all vessels to assist if possible. After a few minutes communicating with other Coast Guard vessels about the *Foxtrot*, Hansen attempted to reestablish contact with Brewer but was unable to do so. Pet. App. 5c.

McGraw's vessel left the Coast Guard dock 13 minutes and ten seconds after radio contact was first made. About 17 minutes and 32 seconds after first contact, McGraw radioed to Hansen that the *Foxtrot* had capsized on Del Monte beach. Hoover was thrown clear of the boat when it capsized, but Brewer was trapped underneath and drowned. Pet. App. 5c.

2. Petitioner filed the instant suit against the Coast Guard under the Suits in Admiralty Act (SIAA), 46 U.S.C. 741 *et seq.*,[1] and the Public Vessels Act (PVA),

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[1] 46 U.S.C. 742 (1994 & Supp. III 1997) permits "appropriate nonjury proceeding[s] in personam * * * against the United States," in cases where, "if a private person or property were involved, a proceeding in admiralty could be maintained." Under

46 U.S.C. 781 *et seq.*,[2] alleging that the Coast Guard negligently failed to timely rescue Brewer. The district court granted summary judgment for the government. Pet. App. 1c-15c. Observing that the SIAA and PVA grant petitioner "no greater rights against the United States than she would have against a private person under similar circumstances," *id.* at 7c, the district court analyzed whether the Coast Guard's conduct fell below the standard for Good Samaritan rescuers established in *Berg* v. *Chevron USA, Inc.*, 759 F.2d 1425 (9th Cir. 1985).

Under *Berg*, a Good Samaritan may be held liable only if: (1) the rescuer's conduct was negligent and that conduct worsened the position of the victim; or (2) the rescuer engaged in reckless and wanton conduct while performing the rescue. 759 F.2d at 1430. On the first *Berg* prong, the district court found no evidence that the Coast Guard's conduct worsened Brewer's condition and noted that petitioner presented no argument on that point. Pet. App. 9c. On the second *Berg* prong, the court observed that a finding of reckless and wanton conduct requires a showing that the Coast Guard acted "intentionally or with conscious disregard for a known or obvious risk of danger." *Id.* at 11c. The court found no evidence that the Coast Guard acted in that manner in this case. Acknowledging that "more

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46 U.S.C. 743, the government's liability for maritime torts under the SIAA is the same as that "obtaining in like cases between private parties."

[2] 46 U.S.C. 781 permits suits "in admiralty * * * against the United States * * * for damages caused by a public vessel of the United States." Under 46 U.S.C. 782, suits brought pursuant to the PVA "shall be subject to and proceed in accordance with the provisions" of the SIAA, to the extent the SIAA is not inconsistent with the PVA.

tha[n] six minutes elapsed between the time McGraw was directed to rescue Brewer and Hoover and when the Coast Guard vessel left the dock," the court also noted the presence in the record of "essentially uncontradicted evidence that this delay of more than six minutes did not represent any uncommon or unusual amount of time in launching the rescue vessel." *Ibid.* In light of that uncontroverted evidence, the court held that such an interval "certainly did not represent reckless and wanton conduct," *id.* at 11c-12c, and granted the government's motion for summary judgment. *Id.* at 15c.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-3a. Applying *Berg*, the court held that the Coast Guard's conduct was neither reckless nor wanton and did not worsen Brewer's position. *Id.* at 2a-3a. While the court was willing to "assume that some of the delay in reaching the [*Foxtrot*] and summoning ground emergency services is attributable to negligence," it found "nothing in the record to support a finding that the Coast Guard intentionally delayed the rescue or acted with a conscious disregard for the risks involved." *Id.* at 2a. The court also declined to "reexamine the scope of liability of the Coast Guard under established federal law." *Id.* at 3a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Under the SIAA, the United States waives its sovereign immunity and subjects itself to suit for the actions of its employees only in circumstances where a private party would be subject to maritime tort liability

for the same conduct. See 46 U.S.C. 742 (1994 & Supp. III 1997) (permitting "any appropriate nonjury proceeding in personam" in cases where "if a private person or property were involved, a proceeding in admiralty could be maintained."). The PVA, in turn, permits suits "in admiralty * * * against the United States * * * for damages caused by a public vessel of the United States," 46 U.S.C. 781, and provides that such suits "shall be subject to and proceed in accordance with the provisions" of the SIAA to the extent the SIAA is not inconsistent with the PVA. 46 U.S.C. 782. Accordingly, the SIAA and PVA together authorize suit against the United States only for conduct during a maritime rescue that would yield tort liability if undertaken by a private party.

As petitioner concedes (Pet. 12-17), a private party undertaking a maritime rescue is subject to the Good Samaritan standard. See *Berg*, 759 F.2d at 1429-1430; *Furka* v. *Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1088 (4th Cir. 1985). Under that standard, "a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue." *Berg*, 759 F.2d at 1430. Recognizing that the SIAA and PVA subject the United States to the same standard of care to which private parties are subject in like circumstances, the district court properly applied the Good Samaritan standard to the Coast Guard's actions in this case and concluded that there was no record evidence to support a finding of liability. See Pet. App. 8c-15c.

Petitioner insists (Pet. 12-17) that the Good Samaritan standard should apply only to private parties and not to the Coast Guard. Congress, however, has specified that the government's liability under the SIAA and

PVA shall be the same as that "obtaining in like cases between private parties." 46 U.S.C. 743; see 46 U.S.C. 782 (PVA suits "shall be subject to and proceed in accordance with" the requirements of the SIAA). Having acknowledged (Pet. 12-17) that the Good Samaritan standard applies to private parties undertaking maritime rescues, petitioner offers no reading of the controlling statutes that would permit holding the Coast Guard to a different standard.

2. Contrary to petitioner's assertions (Pet. 6-8), the court of appeals' unpublished opinion in this case does not conflict with the Fifth Circuit's decision in *United States* v. *Gavagan*, 280 F.2d 319 (1960). In *Gavagan*, the Fifth Circuit held the Coast Guard liable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1) (1994 & Supp. IV 1998), 28 U.S.C. 2674 *et seq.*, and the Death on the High Seas Act, 46 U.S.C. 761 *et seq.*, for the loss of a shrimp boat and its crew in a storm. Strictly speaking, therefore, *Gavagan* involved statutory provisions not at issue in this case. Not until 1960, after the events at issue in *Gavagan*, did Congress make the SIAA the sole remedy against the United States for maritime torts, and provide that such suits could no longer be brought under the FTCA. See 28 U.S.C. 2680(d); *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 172-177 & n.14 (1976); *Miller* v. *United States*, 725 F.2d 1311, 1314 (11th Cir. 1984) (discussing the amendment's impact on *Gavagan*'s exercise of FTCA jurisdiction).

To the extent *Gavagan*'s discussion of FTCA liability has some bearing here since that statute, like the SIAA, incorporates standards of conduct applicable to private parties, *Gavagan* is consistent with the court of appeals' decision in this case. In *Gavagan*, the Fifth Circuit found the Coast Guard liable "not for the failure

* * * to reach a vessel in distress in time," 280 F.2d at 321 (internal quotation marks omitted), but rather for the negligent failure of the Coast Guard employees directing the rescue operation to pass on and evaluate vital information concerning the location of the sinking vessel. *Id.* at 321-325. While the Fifth Circuit did not focus its analysis on the Good Samaritan standard, it did find that the facts in that case "fully [met] the requirements of the Good Samaritan doctrine" because the Coast Guard "'worsen[ed]' the plight of the [shrimp boat's] crew members." *Id.* at 328 (quoting *United States* v. *Lawter*, 219 F.2d 559, 562 (5th Cir. 1955) (Coast Guard is liable when it places the victim "in a worse position than when it took charge")). Because the Fifth Circuit found the Coast Guard liable even under the Good Samaritan standard, any difference in approach between that case and this case would not lead to disparate outcomes.[3]

3. Petitioner is also mistaken in her contention (Pet. 8-11) that the court of appeals' decision conflicts with other decisions of the Ninth Circuit. *Bunting* v. *United States*, 884 F.2d 1143 (1989), did not address the appropriate standard of conduct for the Coast Guard during maritime rescues. Rather, that case involved a suit against the Coast Guard under the FTCA for medical

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[3] Neither does the court of appeals' decision conflict with the Fifth Circuit's decision in *Coumou* v. *United States*, 107 F.3d 290, amended 114 F.3d 64 (1997). *Coumou* was not a maritime rescue case. Rather, the issue in that case was whether the government breached a duty of care by failing to inform the Haitian government that the captain of the drug-laden vessel it seized was a government informant, thereby resulting in the captain's six-month incarceration in a Haitian jail. In deciding that issue, the *Coumou* court had no occasion to address the appropriate standard for assessing the Coast Guard's conduct during maritime rescues.

malpractice, in connection with emergency medical services rendered on land by a Coast Guard physician. That distinction aside, the court in *Bunting* held that the Coast Guard *was* entitled to the protection of the Alaskan Good Samaritan statute and thus was not liable for less than gross negligence in rendering emergency services, a standard similar to the one applied in this case. See 884 F.2d at 1145-1147.[4] Thus, *Bunting* is fully consistent with the result here.

Similarly, there is no conflict with *Huber* v. *United States*, 838 F.2d 398 (9th Cir. 1988). That case arose out of the loss of a yacht in a storm off the coast of California. The plaintiffs sued the United States and a private party under the SIAA, and the defendants settled. The United States and the private defendant then filed cross-claims for contribution, and it was those claims that the *Huber* court addressed. See 838 F.2d at 399. In so doing, the court did not reach any legal conclusion regarding the appropriate standard of conduct for the Coast Guard under the SIAA.[5]

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[4] The Alaska Good Samaritan statute eliminates civil liability for emergency aid unless damages are the result of gross negligence, recklessness or intentional misconduct. See *Bunting*, 884 F.2d at 1145-1147.

[5] None of the other cases cited by petitioner involved alleged Coast Guard negligence during a maritime rescue. *Chaffin* v. *United States*, 176 F.3d 1208 (9th Cir. 1999) (FTCA claim resulting from polar bear attack at remote Air Force radar site in Alaska); *Sutton* v. *Earles*, 26 F.3d 903 (9th Cir. 1994) (SIAA claim arising from alleged negligence in failing to warn of an obstruction to navigation); *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985) (SIAA claim arising from alleged negligence in marking obstruction to navigation); *Olympia Sauna Compania Naviera, S.A.* v. *United States*, 670 F. Supp. 1498 (D. Or. 1987) (SIAA liability for negligently implementing grid positioning project and

Even if the court of appeals' decision in this case were in tension with other Ninth Circuit precedents, such intra-circuit conflicts are best resolved by the court of appeals concerned and generally do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

4. Assertions of conflict aside, petitioner incorrectly contends that the Coast Guard was under a statutory obligation in this case to "perform any and all acts necessary to rescue and aid persons and protect and save property." Pet. 16 (quoting 14 U.S.C. 88(a)(1)). Petitioner omits the opening clause of the statutory provision she cites, which makes clear that the Coast Guard is permitted—not required—to undertake such rescues. See 14 U.S.C. 88(a) (providing that the Coast Guard "may" so act).

Moreover, the waiver of sovereign immunity contained in the SIAA does not extend to suits challenging the Coast Guard's discretionary decisions regarding whether to undertake a rescue in the first instance. As the Ninth Circuit has explained, "the Coast Guard, because of its limited resources, [can] not help all ships in distress, and [has] to make a policy judgment to use its resources to help [a particular] ship. This decision [is] a protected discretionary decision" and is not subject to challenge in a suit under the SIAA or PVA. *Arizona Maintenance Co.* v. *United States*, 864 F.2d 1497, 1503 (9th Cir. 1989); see *Good* v. *Ohio Edison Co.*, 149 F.3d 413, 418-419 (6th Cir. 1998) (United States retains its sovereign immunity under the SIAA for "discretionary

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mis-positioning a Coast Guard buoy, causing a failure to warn mariners of navigational obstructions).

functions"); *Cassens* v. *St. Louis River Cruise Lines, Inc.*, 44 F.3d 508, 511 (7th Cir. 1995); *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1087 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977).

Accordingly, petitioner's references (Pet. 3, 7, 9) to the total elapsed time between Hansen and Brewer's first radio contact and Brewer's ultimate death are inapposite. The Coast Guard is subject to potential liability only for its conduct in connection with a rescue attempt once it begins to undertake that rescue. See *Huber*, 838 F.2d at 401 (observing that the Coast Guard may not be held liable for its choice of "whether or how to attempt to assist" a vessel in distress). In this case, the interval between the Coast Guard's decision to attempt to help the *Foxtrot* and the rescue vessel's departure from the Coast Guard dock was approximately six and one-half minutes. Pet. App. 10c. Neither the district court's application of the Good Samaritan standard to the Coast Guard's actions during that interval nor its determination that the record contains no evidence capable of supporting a finding of liability under that standard warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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